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Supreme Court, U.S.
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No. 96-1890

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

HECTOR BERELLEZ, BILL WATERS,
PETE GRUDEN and JACK LAWN,
Petitioners,

vs.

HUMBERTO ALVAREZ-MACHAIN,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this court should review the decisions of the District Court and the Ninth Circuit to deny Petitioners' motions to dismiss before Respondent has had an opportunity to amend his Complaint to state with more particularity violations of Respondent's constitutional rights inside the United States where Respondent originally alleged a course of outrageous government conduct occurring in Mexico and the United States as a basis for his Bivens claims.

2. Whether Petitioners can raise before this Court the issue of whether a heightened pleading standard applies to Respondent's Complaint when Petitioners did not raise that issue before either the District Court or the Court of Appeals.

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HECTOR BERELLEZ, BILL WATERS,
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Petitioners,

v.

HUMBERTO ALVAREZ-MACHAIN,
Respondent.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Humberto Alvarez-Machain submits this brief in opposition to the Petition for a Writ of Certiorari in this case filed by Petitioners Hector Berellez, Bill Waters, Pete Gruden and Jack Lawn.

STATEMENT OF THE CASE

Respondent Humberto Alvarez-Machain alleges in his Amended Complaint ("Complaint") in this action that he was abducted from his home in Mexico, tortured, and forcibly brought to the United States by agents of the United States government to stand trial for the murder of Drug Enforcement Administration (hereinafter "DEA") Special Agent Enrique Camarena Salazar. After arriving in the United States, Respondent alleges that he was deprived of food, subjected to coercive threats in the aftermath of his torture, and imprisoned under a false name so that his relatives could not contact him. The facts are set out in more detail by the trial court in its Memorandum Opinion, see Pet. App. 30a-34a, and are summarized here.[1]

On April 2, 1990, Respondent was abducted at gunpoint from his medical offices in Guadalajara, Mexico. He was then punched in the stomach, subjected to electric shocks, and twice injected with an unknown substance that made him light-headed and dizzy. Respondent was then

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[1]As no discovery has yet taken place and this Petition arises from a motion to dismiss, all facts are viewed in the light most favorable to Respondent. Petitioners recite in the "Statement of the Case" section of their Petition several "facts" that Petitioners contend were found by the District Court in Respondent's criminal prosecution. Pet. Cert. 3-8. This Petition must be evaluated only in the context of the allegations of Respondent's Complaint.

transported by private plane to El Paso, where he arrived on April 3. Petitioner Hector Berellez and others met Respondent on the runway and took him into custody.

Respondent was taken to another location and interrogated. He was deprived of food and subjected to verbal threats during this period. On April 4, Respondent complained of chest pains and received medical treatment in El Paso. Until April 10, when he was transported to Los Angeles, the government purposefully identified Respondent with a pseudonym. Respondent was then transported to Los Angeles for arraignment. On December 14, 1992, after two years of continuous imprisonment, the District Court granted Respondent's motion for acquittal on all charges.

On July 9, 1993, Respondent initiated this action seeking damages under various constitutional and tort theories. In formulating his Bivens claims against these Petitioners, Respondent did not distinguish between the portions of his claims based on acts occurring in Mexico and acts occurring in the United States. The various Defendants moved for dismissal of all claims under Fed. R. Civ. Proc. 12(b), on grounds of lack of personal jurisdiction, lack of subject matter jurisdiction, and failure to state a claim under which relief could be granted. The trial court granted the motions in part and denied them in part. Pet. App. 29a-76a.

The bulk of the trial court's Memorandum Opinion is not before this Court; however, the holdings that are before this Court are set forth below:

The District Court held that Respondent's allegations of torture and inhumane treatment occurring in Mexico did not state a cause of action under Bivens because Petitioners were shielded by qualified immunity from suit since it was not clearly established as of April 1990 that the Fourth or Fifth Amendments applied to the torture of an alien outside the United States. Pet. App. 44a-51a.

The District Court held that Respondent had stated four "potential constitutional violations" which occurred after Respondent arrived in the United States. First, DEA agents, including Petitioner Berellez, threatened Respondent while interrogating him; second, the agents denied Respondent food during his imprisonment; third, Respondent was incarcerated under a false name, making it impossible for Respondent to be reached by his relatives, counsel, or the Mexican government; and fourth, Respondent was threatened, locked in a small windowless room, forced to stand naked, and photographed. Pet. App. 51a-52a.[2]

During the course of the hearing on Petitioners' motion, the District Court noted that Respondent might need to amend his complaint before proceeding with discovery. However, the District Court's order did not require

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[2]This fourth violation was alleged in Respondent's Complaint, but the District Court noted that it was unsure whether Respondent was alleging that it amounted to a constitutional tort. Pet. App. 52a n. 10. Respondent does assert claims based on this conduct.

respondent to amend his complaint. Pet. App. 76a The interlocutory appeals filed by Petitioner in March 1995 and the District Court's subsequent stay of all trial court proceedings has made it impossible for Respondent to amend his complaint.

Significantly, the District Court noted that under Ninth Circuit law, "[a] heightened pleading standard applies to Bivens cases where the defendant is entitled to assert the qualified immunity defense and where her or his knowledge or intent is an element of the plaintiff's constitutional tort.... *The defendants do not argue that the heightened standard should apply in this case."* Pet. App. 52a n. 11 (emphasis added).

The Ninth Circuit's amended opinion affirmed the District Court's denial of Petitioners' motion to dismiss Respondent's claims of constitutional violations within the United States. The Ninth Circuit held that Respondent's allegations, if proven, could state claims under the Fifth Amendment Due Process clause standard for pre-trial detainees. Pet. App. 9a-10a. The Ninth Circuit affirmed the District Court's ruling that Respondent could not assert a Fifth Amendment Due Process claim for acts occurring in Mexico because of the prior criminal proceedings in this case. Pet. App. 10a-11a.

After the issuance of the District Court's Memorandum Opinion, the District Court stayed this action pending the determination of interlocutory appeals. At such time as the stay is lifted, Respondent intends to move to amend his Complaint, if necessary, to state the violations of

Respondent's constitutional rights which occurred after Respondent arrived in the United States in more detail. To date virtually nothing has happened in this action for more than three years since Petitioners filed their motion to dismiss.

REASONS FOR DENYING THE WRIT

A. There Is No Persuasive Reason For This Court To Review The District Court And Court Of Appeals' Decisions Not To Dismiss Respondent's Complaint At This Stage Of This Action Before Respondent Has Had An Opportunity To Amend His Complaint, If Necessary.

Respondent's Bivens claims against these Petitioners were framed as a continuing course of conduct by Petitioners, both outside and inside the United States, which violated Respondent's Fourth and Fifth Amendment rights. Respondent's position was that the Fifth Amendment applied extraterritorially to limit the U.S. Government's conduct in Mexico as well as functioning as a limitation against the Government's conduct within our borders. The District Court ruled against Respondent on this issue. Pet. App. 44a-51a.[3]

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[3]The Ninth Circuit also found that Respondent may not bring a Fifth Amendment Due Process claim based on his mistreatment in Mexico, on different grounds. Pet. App. 10a-11a.

Both the District Court and the Court of Appeals recognized that dismissal of Respondent's Complaint at this initial stage of the case without allowing Respondent leave to flesh out his allegations of misconduct within the United States would elevate form over substance by dismissing a complaint that both lower courts held potentially states causes of action for violations of the Constitution. See Pet. App. 52a (District Court: "Alvarez may be able to prove that the defendants violated his clearly established constitutional rights and will be given the opportunity to obtain such proof."), 10a (Court of Appeals: "Each of these allegations, if proven, served to create an atmosphere of fear and isolation, imposing 'gratuitous suffering' in violation of Hoptowit [v. Ray, 682 F.2d 1237, 1246 (9th Cir. 1982)].").

Not only were the District Court and the Court of Appeals correct; any other ruling would have been an abuse of discretion. "In appraising the sufficiency of the complaint..., the accepted rule [is] that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his [or her] claim which would entitle him [or her] to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Nothing in this Court's precedents regarding qualified immunity displaces this longstanding rule that protects plaintiffs from having their complaints dismissed before they have had a full opportunity to state their claims.

Rather, the remedy for a pleading that does not state its claims with sufficient particularity is a motion for a more definite statement, Fed. R. Civ. Proc. 12(e); if granted, the

motion forces the plaintiff to amend his or her complaint to state his or her claims with more particularity under penalty of striking the complaint.

Behrens v. Pelletier, 133 L. Ed. 2d 773 (1996), cited by Petitioners, supports this approach. Behrens holds that a defendant is not barred from appealing an adverse determination of a qualified immunity issue on summary judgment by the fact that the defendant has already appealed, and lost, the qualified immunity issue in the motion to dismiss stage. Id. at 786. Under Behrens, Petitioners' right to qualified immunity, if it exists at all, will be fully protected, because the Court of Appeals' decision will not preclude Petitioners from reviewing their motion when the legal issues pertinent to qualified immunity are squarely presented for decision.

Petitioners' attempt to create a conflict between the qualified immunity standard applied by the Ninth Circuit and the standard applied by other circuit courts. There is no such conflict. As Petitioners essentially concede, the Ninth Circuit applied the same test applied by other circuits on this issue, following the decisions of this Court. See, e.g., Triad Assocs, Inc. v. Robinson, 10 F.3d 492, 496 (7th Cir. 1993); Pritchett v. Alford, 973 F.2d 307, 312 (4th Cir. 1992). Even if a such conflict existed, this case is an inappropriate vehicle for resolving any such conflict.

Petitioners claim, essentially, that the Court of Appeals erred in applying a two-part, rather than a three-part, test for determining whether Respondent's Complaint should be dismissed on the ground of qualified immunity. Pet. Cert.

9-10. However, the District Court and the Court of Appeals wisely denied Petitioners' motion because Respondent has not been afforded an opportunity to amend his Complaint to allege the constitutional claims with greater particularity; Respondent's Complaint originally sought to allege a course of conduct both inside and outside the United States which violated the Constitution but Respondent lost his claim that the Fifth Amendment applied to the Government's extraterritorial conduct. In such a case, it is prudent to allow Respondent to allege the remaining constitutional claims with particularity, especially where, as here, the claims stated potential constitutional violations even in their current form.

Petitioners ignore the fact that many cases limit abusive government conduct during custodial interrogation and find that such conduct gives rise to civil liability. See, e.g., Cooper v. Dupnik, 963 F.2d 1220 (9th Cir.) (en banc), cert. denied, 121 L.Ed. 2d 332 (1992); Weaver v. Brenner, 40 F.3d 527 (2nd Cir. 1994): Duncan v. Nelson, 466 F.2d 939 (7th Cir.) cert. denied, 409 U.S. 894 (1972). See also Rex v. Teeples, 753 F.2d 840, 843 (10th Cir. 1985); Fluellen v. Drug Enforcement Agency, 816 F.Supp. 1206 (E.D. Mich. 1993).

Specifically, none of the other cases cited by Petitioners involve this unique factual situation. In Siegert v. Gilley, 500 U.S. 226, 233 (1991), the Court reversed the denial of a motion to dismiss where the plaintiff's allegations could not under any construction support the conclusion that *any* constitutional right was violated, as the Court had specifically rejected the same claim in Paul v. Davis, 424

U.S. 693 (1976). Here, even Petitioners concede that one of the four potential constitutional violations identified by the District Court, the denial of food, could, if serious enough, "reach constitutional proportions." Pet. Cert.13 . As for the other three potential constitutional violations identified by the District Court, these claims also state constitutional claims. Petitioners do not even argue that locking a pre-trial detainee in a windowless room naked, threatening the person, and photographing the detainee does not constitute a constitutional violation.

Petitioners have not shown that incommunicado incarceration can never violate a pre-trial detainee's constitutional rights, either. See, e.g., Darwin v. Connecticut, 391 U.S. 346, 349 (1968) (per curiam) (holding confession involuntary and inadmissible where it was procured after 30 to 48 hours of incommunicado incarceration).

Nor do the cases cited by Petitioners, Pet. Cert. 13, establish that threats can never rise to the level of a constitutional violation. For instance, a law enforcement officer who threatened government employees with termination of employment if they did not incriminate themselves was held to have violated the employees' Fifth Amendment rights. Garrity v. New Jersey, 385 U.S. 493, 496 (1967). The cases cited by Petitioners at the most merely hold that profane language and generic threats by prison guards to make life difficult for prisoners may not amount to constitutional violations. Oltarzewski v. Ruggiero, 830 F.2d 136, 139 (9th Cir. 1987) (profanity); Martin v. Sargent, 780 F.2d 1334, 1338 (9th Cir. 1985)

(threat by prison guard to give prisoner a bad time in prison). Collins v. Cundy, 603 F.2d 825, 827 (10th Cir. 1979), did not involve a threat or even mention the word "threat" in the opinion, while Thomas v. Cabanow, 978 F.2d 1261 (7th Cir. 1992), affirming the unpublished opinion cited by Petitioners, assumed arguendo that a prison official could be held liable for failing to protect a prisoner who was threatened, a more tenuous constitutional claim than a direct threat from a governmental officer. These cases do not present the same coercive, intimidating context in which Respondent's claims arise.

The remainder of the cases cited by Petitioners either involve summary judgment motions, where the plaintiff has had a chance in evidentiary declarations to flesh out the allegations of his or her complaint, or support Respondent's position that the District Court and Court of Appeals acted properly in not dismissing Respondent's Complaint without affording Respondent an opportunity to amend. Harlow v. Fitzgerald, 457 U.S. 800, 819--820 (1982) (remanding for further proceedings where denial of *summary judgment* was entered on qualified immunity issue based on incorrect standard); Anderson v. Creighton, 483 U.S. 635, 646 (1987) (remanding for further proceedings after reversal of *summary judgment* for officer); Hunter v. Bryant, 502 U.S. 224, 229 (1991) (per curiam) (reversing order denying *summary judgment*); Somers v. Thurman, 109 F.3d 614, 616 (9th Cir. 1997) (reversing order denying *summary judgment*); Reynolds v. County of San Diego, 84 F.3d 1162, 1170 (9th Cir. 1996) (affirming order granting *summary judgment*); Mendoza v. Block, 27 F.3d 1357 (9th Cir. 1994) (affirming dismissal of claim based on qualified

immunity *after evidentiary hearing in District Court*); Triad Assocs. v. Robinson, 10 F.3d 492, 497-98 (7th Cir. 1993) (affirming denial of motion to dismiss; distinguishing summary judgment situation where plaintiff must do more than allege constitutional violations in general terms); Act Up!/Portland v. Bagley, 988 F.2d 868, 873 (9th Cir. 1993) (reversing order denying *summary judgment*); Pritchett v. Alford, 973 F.2d 307, 318 (4th Cir. 1992) (affirming denial of *summary judgment*).

Petitioners' implication that the qualified immunity test used by the Court of Appeals is somehow inconsistent with this Court's holding in Siegert is incorrect. Siegert, as noted above, held that a defendant is entitled to qualified immunity at the motion to dismiss stage where the complaint fails to state facts sufficient to state a constitutional violation. As the Seventh Circuit persuasively explained, Siegert does not call into question the two-part test used by the Ninth Circuit in this case and by all other circuits; rather, "Siegert... only indicate[s] that determining that alleged conduct does not establish a prima facie constitutional claim serves as a logical shortcut to finding that the alleged conduct did not violate clearly established constitutional standards". Triad Assocs., 10 F.3d at 497 n.2. Thus, Siegert's holding is subsumed in the test that the Court of Appeals used. Thus, the Ninth Circuit's decision does not conflict with any decisions of this Court and there is no need for review on this basis.

Nor is there any basis to Petitioners' contention that the Court of Appeals' ruling was erroneous in denying the motion to dismiss on the ground that Respondent's

complaint allegedly did not allege with sufficient particularity the involvement of the individual Petitioners.

First, Taylor v. List, 880 F.2d 1040, 1045-1046 (9th Cir. 1989), and Ybarra v. Reno Thunderbird Mobile Home Village, 723 F.2d 675, 680-81 (9th Cir. 1984), were summary judgment cases which have nothing to say on the issue of whether individual defendants' conduct must be *pleaded*. Siegert, as discussed above, merely holds that where a complaint fails to allege *conduct* that violates the Constitution, that complaint can be dismissed. Siegert has nothing to say about whether the allegations need be individualized.

In Veney v. Hogan, 70 F.3d 917, 922 (6th Cir. 1995) (emphasis added), the court held that "*if [the plaintiff's] original complaint is deficient [in alleging particular facts to support the denial of qualified immunity, the plaintiff] must amend his [or her] complaint*" to allege the facts with more particularity. Respondent, of course, has had no opportunity to amend his Complaint in response to the ruling on Petitioners' motion to dismiss. In any event, in Veney, the gravamen of the plaintiff's claim was wrongful denial of a promotion, and the court reasoned that the plaintiff had known who was involved in the denial of his promotion and how. Id. A similar assumption cannot be made here, where Respondent cannot without discovery learn who was responsible for the conduct alleged in the Complaint.

Finally, Wicks v. Mississippi State Employment Services., 41 F.3d 991, 994-95 (5th Cir.), cert. denied, 132 L. Ed. 2d

809 (1995), again involves a claim of wrongful denial of a promotion, and in Wicks, there was no issue of failing to identify which defendant was responsible for what which conduct. Additionally, Wicks applies a heightened pleading standard; Petitioners have waived any right to seek such a standard here.

B. Petitioners Waived Any Argument That A Heightened Pleading Standard Applies To This Case; In Any Event, This Case Does Not Present The Issue Squarely for Review.

In its Memorandum Opinion, the District Court noted that under Ninth Circuit law, "[a] heightened pleading standard applies to Bivens cases where the defendant is entitled to assert the qualified immunity defense and where her or his knowledge or intent is an element of the plaintiff's constitutional tort.... *The defendants do not argue that the heightened standard should apply in this case.*" Pet. App. 52a n. 11 (emphasis added). Petitioners never asked for reconsideration of this decision in the District Court.

On appeal, Petitioners had a full opportunity to brief any claims that the District Court erred. Once again, Petitioners did not raise the issue of whether a heightened pleading standard applied.[4] Under these circumstances, Petitioners

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[4]Petitioners admit they failed to raise this issue below. Pet. Cert. 18 n. 12. However, Petitioners asserted that since they argued that the Complaint failed to state the facts with sufficient specificity, Petitioners have not

have waived the issue.

Even if Petitioners had not waived this issue, this is not the proper case to resolve the conflict on this issue. The cases cited by Petitioners do not mandate that a Complaint that fails to meet the heightened pleading standard be dismissed prior to amendment. Veney, 70 F.3d at 922 (no dismissal for failing to plead with specificity until plaintiff has opportunity to amend); Wicks, 41 F.3d at 997 (same); Kartseva v. Department of State, 37 F.3d 1524, 1530 (D.C. Cir. 1994) (dismissing under Siegert where complaint fails to state any constitutional violation; does not reach opportunity to amend issue); Dunbar Corp. v. Lindsey, 905 F.2d 754, 764 (4th Cir. 1990) (holds complaint meets standard and does not address opportunity to amend issue).[5] There is thus

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waived this issue. This analysis is without merit. Faced with an order of the District Court that clearly stated that Petitioners *had not* argued for a heightened pleading standard, Petitioners' proper recourse was to move for reconsideration of that order to preserve the issue if they felt that the District Court's conclusion was incorrect, or at the very least, to raise the issue before the Court of Appeals.

[5]Crawford-El v. Britton, 93 F.3d 813, 823 (D.C. Cir.) (en banc), pet. for cert. filed, No. 96-827 (Nov. 25, 1996), actually holds that a heightened pleading standard is not required except in cases where specific intent is at issue and is thus not in conflict with the Ninth Circuit at all on this issue. Opinion, see Pet. App. 30a-34a, and are

no conflict on the issue here, i.e., whether a complaint should be dismissed that alleges a pattern of conduct, some of which contains potential constitutional violations, before the plaintiff has had an opportunity to amend to flesh out the factual allegations in his Complaint

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Dated: June 27, 1997

Respectfully submitted,

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summarized here.